

September 2004

MJI Publication Updates

**Child Protective Proceedings Benchbook
(Revised Edition)**

**Criminal Procedure Monograph 6—Pretrial
Motions (Revised Edition)**

**Juvenile Justice Benchbook (Revised
Edition)**

Juvenile Traffic Benchbook

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 2

Reporting & Investigating Suspected Child Abuse & Neglect

2.1 Definitions Under the Child Protection Law

A. “Child Abuse”

Insert the following “Note” near the middle of page 13, after the first paragraph:

Note: The current version of MCL 722.622(f) became effective on December 30, 2002. 2002 PA 693. Previously, “child abuse” was defined as “harm or threatened harm to a child’s health or welfare by a parent, a legal guardian, or any other person responsible for the child’s health or welfare, or by a teacher or teacher’s aide, that occurs through nonaccidental physical or mental injury; sexual abuse; sexual exploitation; or maltreatment.” The Court of Appeals in *People v Beardsley*, ___ Mich App ___, ___ (2004), held that the previous definition of “child abuse” required a mandatory reporter to report the abuse to FIA only when the suspected perpetrator is a parent, legal guardian, teacher, teacher’s aide, or other person responsible for the child’s health and welfare. The Court rejected the argument that sexual abuse, sexual exploitation, or maltreatment by *any* person must be reported. The Court noted that 2002 PA 693 amended the definition of “child abuse” to clarify that “the physical or mental injury, sexual abuse or exploitations, or maltreatment must be committed by one of the enumerated persons– not just any person – in order to be a mandatory reportable act[.]” under the Child Protection Law. *Beardsley*, *supra* at ___, n 3.

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.28 Motion to Suppress the Fruits of Illegal Police Conduct

Add the following case summary to the January 2004 update to page 64:

Inculpatory evidence obtained after police officers refused a defendant's request that they leave the defendant's home is inadmissible as fruit of the poisonous tree. *People v Bolduc*, ___ Mich App ___, ___ (2004). In *Bolduc*, the defendant opened his door to two law enforcement officers and allowed them to enter his home. The defendant denied possessing marijuana, refused to consent to a search of his home, and asked the officers to leave. Instead of leaving, however, one of the officers began questioning the defendant about a bulge in the defendant's pocket. The defendant explained that the bulge was \$6,500 from a sale he made earlier that day at the defendant's used car lot. The defendant offered to confirm the source of the money by taking the officers to the car lot to verify the sale. The defendant was unable to prove that the sum of money in his pocket was the result of a sales transaction. The defendant eventually admitted to possessing marijuana and took the officers back to his house where the defendant turned over nine bags of marijuana to the officers.

Under these circumstances, the Court of Appeals ruled that the police officers exceeded the constitutional limits of a properly conducted "knock and talk" interaction with the defendant and in doing so, created a coercive environment in which the defendant's subsequent cooperation could not be considered voluntary. *Bolduc*, *supra* at ___. Applying the standard test to the facts in *Bolduc*, the Court concluded that under the totality of circumstances—the "knock and talk" encounter occurred inside the defendant's home where no real retreat was possible beyond the verbal and physical indication given by the defendant that he wished the officers to leave—a reasonable person would not have felt free to ignore the police officers' presence and go about his business. *Bolduc*, *supra* at ___. According to the Court:

“By failing to leave defendant’s home when requested to do so, the police officers suggested that they were in control of the situation and would not accept defendant’s exercise of the right to preclude them from further activity at the home.

* * *

“Unlike a street encounter, a person such as defendant does not have the option to test whether he is actually confined by the police conduct that he is faced with by simply walking away. Where was defendant to go to avoid the intrusion of the police upon his own property? At that point, defendant had done everything that was reasonably possible for him to convey the message that the police were no longer welcome in his home.” *Bolduc, supra* at ____.

Although the inculpatory evidence was obtained after the coercive “knock and talk” incident inside the defendant’s home, the coercion tainted any evidence obtained as a result of the officers’ initial visit to the defendant’s home. The incriminating evidence obtained during the defendant’s later “cooperation” with the officers “ensued from the police officers’ improper conduct in failing to leave when requested[and was] properly suppressed as the fruit of the illegal seizure” *Bolduc, supra* at _____. The Court reiterated the constitutional considerations present in such an encounter:

“In sum, while the police are free to employ the knock and talk procedure, [*People v Frohriep*, [247 Mich App 692 (2001)]], they have no right to remain in a home without consent, absent some other particularized legal justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the person’s house following the person’s request that they do so, absent a legal basis for the police to remain independent of the person’s consent.” *Bolduc, supra* at ____.

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 7

Pretrial Proceedings in Delinquency Cases

7.6 Selected Search and Seizure Issues

Strip and body cavity searches.

Near the middle of page 159, immediately before Section 7.7, insert the following text:

In *Reynolds v City of Anchorage*, ___ F3d ___, ___ (CA 6, 2004), the U.S. Court of Appeals for the Sixth Circuit, quoting *Bell v Wolfish*, 441 US 520, 559 (1979), held:

“[T]he determination of the reasonableness under the Fourth Amendment of a strip search of a juvenile delinquent in a detention facility requires us to balance ‘the need for the particular search against the invasion of personal rights that the search entails.’ *Wolfish*, 441 U.S. at 559.”

In *Reynolds*, the police arrived at a juvenile detention facility following a report that some of the girls were “acting strangely” and “might be under the influence of drugs and might have drugs in their possession.” *Reynolds, supra*, ___ F3d at ___. The officers conducted a search of the girls’ rooms and found items that the officers “believed to be associated with drug use.” *Reynolds, supra*, ___ F3d at ___. One of the juvenile girls, Reynolds, insinuated to the staff members and the officers that she might have drugs hidden in her undergarments. Based upon the officers’ findings and Reynold’s insinuation, a female officer conducted a strip search of Reynolds. In determining that this search did not violate Reynolds’ Fourth Amendment rights, the Court stated:

“Applying this balancing approach, we conclude that Officer Watson’s strip search of Reynolds was not unreasonable. In so concluding, we apply *Wolfish*’s admonition to ‘consider the scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was]

conducted.’ *Id. Wolfish* also pointed out that a ‘detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence.’ *Id.* The Bellewood Home also was ‘a unique place fraught with’ a variety of problems and dangers, including the use of drugs by its residents. . . .

* * *

“Although the strip search was a highly invasive procedure, it was no more invasive than necessary to accomplish its purpose of insuring that Reynolds and the other girls were not concealing drugs on their persons. It was conducted in a way designed to minimize its intrusive effect. Officer Watson made the search in the privacy of the girls’ own rooms and in the presence of only a single staff member. She did not touch any of the girls during the search. Considering all the circumstances, we conclude that Officer Watson’s strip search of Reynolds was not unreasonable.” *Reynolds, supra*, ___ F3d at ___.

The Court also indicated that balancing the need for the particular search against the invasions of personal rights that the search entails is not dependent on the identity of the person conducting the search. The Court indicated that this same strip search would have been reasonable if it had been conducted by the staff of the juvenile detention center. The Court stated:

“We see no valid reason why the result should be different because it was a police officer who conducted the search. In either instance, the purpose and objective of the search was the same: to help the [juvenile detention center] determine whether the girls possessed drugs, and thus to aid the [juvenile detention center] in uncovering what the facts suggested may have been the illegal use of drugs by some of the residents.” *Reynolds, supra*, ___ F3d at ___.

September 2004

Update: Juvenile Traffic Benchbook

CHAPTER 2

Obtaining Custody of a Juvenile Following a Criminal Traffic Offense

2.3 Notice and Custody Requirements When a Juvenile Is Charged With Illegal Transport or Possession of Alcoholic Liquor or Having Any Bodily Alcohol Content*

Effective September 1, 2004, 2004 PA 63 amended MCL 436.1703 to prohibit a minor from having any bodily alcohol content except under certain circumstances. Change the title of Section 2.3 as indicated above and beginning with the second paragraph on page 2-7, replace the content of Section 2.3 with the following:

A police officer may obtain custody of a person for a violation of MCL 436.1703 (minor purchasing, consuming, or possessing alcoholic liquor or having any bodily alcohol content). An officer who witnesses a violation of this statute may stop and detain the person, obtain satisfactory identification, seize illegally possessed alcoholic liquor, and issue an appearance ticket under MCL 764.9c.* MCL 436.1705.

If a police officer has reasonable cause to believe a minor has consumed alcoholic liquor or has any bodily alcohol content, the officer may require the minor to submit to a preliminary chemical breath test (PBT). The police officer may arrest a minor based on the results of the PBT. Refusal of a minor to submit to a PBT constitutes a civil infraction. MCL 436.1703(6).

Note: A federal district court in Michigan has found that a local ordinance substantially similar to MCL 436.1703(6) violated the Fourth Amendment to the U.S. Constitution. *Spencer v Bay City*, 292 F Supp 2d 932 (ED Mich, 2003).

If the minor is less than 18 years old and unemancipated, the arresting officer must notify the minor's parent or parents, guardian, or custodian if the name of the parent, guardian, or custodian is reasonably ascertainable. This notice must be given within 48 hours after the officer determines that the person is

*See Chapter 9 for a description of the offenses treated in this section.

*Under this statute, a police officer may issue an appearance ticket and release the person following alleged misdemeanor. See also MCR 3.931(C)(1)(b), which allows the issuance of an appearance ticket to a juvenile under MCL 764.9c.

less than 18 years old and may be by any means reasonably calculated to give prompt actual notice of the offense, including notice in person, by telephone, or by first-class mail. If the minor is unemancipated, less than 17 years old, and incarcerated for a violation of MCL 436.1703(1), the minor's parents or legal guardian must be notified immediately. MCL 436.1703(7).

CHAPTER 5

Dispositional Hearings

5.6 Deferred Proceedings Under MCL 436.1703(3)

Effective September 1, 2004, 2004 PA 63 amended MCL 436.1703 to allow for deferred proceedings under certain circumstances. On page 5-6, add a new Section 5.6 and renumber succeeding sections accordingly.

MCL 436.1703(3) permits a court to defer proceedings regarding a first-time violator of MCL 436.1703(1), which prohibits a minor from purchasing, consuming, or possessing alcoholic liquor, or from having any bodily alcohol content. MCL 436.1703(3) states in part:

“(3) When an individual who has not previously been convicted of or received a juvenile adjudication for a violation of subsection (1) pleads guilty to a violation of subsection (1) or offers a plea of admission in a juvenile delinquency proceeding for a violation of subsection (1), the court, without entering a judgment of guilt in a criminal proceeding or a determination in a juvenile delinquency proceeding that the juvenile has committed the offense and with the consent of the accused, may defer further proceedings and place the individual on probation upon terms and conditions that include, but are not limited to, the sanctions set forth in subsection (1)(a),* payment of the costs including minimum state cost as provided for in section 18m of chapter XIA of the probate code of 1939, 1939 PA 288, MCL 712A.18m, and section 1j of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1j, and the costs of probation as prescribed in section 3 of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.3.”

If the court determines that the juvenile is using this procedure in another court, or if the juvenile violates a condition of probation, the court may find that the juvenile has committed the charged violation of MCL 436.1703(1) and proceed to disposition. MCL 436.1703(3).

If the juvenile fulfills the terms and conditions of probation, the court must discharge the juvenile and dismiss the proceedings without a finding of responsibility for the offense and without entering an order of adjudication. *Id.* “There may be only 1 discharge or dismissal . . . as to an individual.” *Id.*

*For
permissible
uses of this
nonpublic
record, see
MCL
436.1703(3)(a)
–(b).

While proceedings are deferred and the juvenile is on probation, the court must maintain a nonpublic record of the case. The Secretary of State must maintain a nonpublic record* of a plea and discharge or dismissal under MCL 436.1703(3). *Id.*

CHAPTER 9

Elements of Selected Criminal Traffic Offenses

9.5 Minor Purchasing, Consuming, or Possessing Alcohol, or Having Any Bodily Alcohol Content

Effective September 1, 2004, 2004 PA 63 amended MCL 436.1703 to prohibit a minor from having any bodily alcohol content except under certain circumstances. On page 9-7, change the title of Section 9.5 as indicated above and replace the content of Section 9.5 with the following:

A. Statute

“(1) A minor shall not purchase or attempt to purchase alcoholic liquor, consume or attempt to consume alcoholic liquor, possess or attempt to possess alcoholic liquor, or have any bodily alcohol content, except as provided in this section. A minor who violates this subsection is guilty of a misdemeanor punishable by the following fines and sanctions and is not subject to the penalties prescribed in section 909:

“(a) For the first violation a fine of not more than \$100.00, and may be ordered to participate in substance abuse prevention services or substance abuse treatment and rehabilitation services as defined in section 6107 of the public health code, 1978 PA 368, MCL 333.6107, and designated by the administrator of substance abuse services, and may be ordered to perform community service and to undergo substance abuse screening and assessment at his or her own expense as described in subsection (4).

“(b) For a violation of this subsection following a prior conviction or juvenile adjudication for a violation of this subsection, section 33b(1) of former 1933 (Ex Sess) PA 8, or a local ordinance substantially corresponding to this subsection or section 33b(1) of former 1933 (Ex Sess) PA 8, by imprisonment for not more than 30 days* but only if the minor has been found by the court to have violated an order of probation, failed to successfully complete any treatment, screening, or community service ordered by the court, or failed to pay any fine for that conviction or juvenile adjudication, a fine of not more than \$200.00, or both, and may be ordered to participate in substance abuse prevention services or substance abuse treatment and rehabilitation services as defined in section 6107 of the public health code, 1978 PA 368, MCL 333.6107, and

*Effective September 1, 2004, 2004 PA 63 authorizes a term of imprisonment for repeat offenders under certain circumstances.

*Effective
September 1,
2004, 2004 PA
63.

designated by the administrator of substance abuse services, to perform community service, and to undergo substance abuse screening and assessment at his or her own expense as described in subsection (4).

“(c) For a violation of this subsection following 2 or more prior convictions or juvenile adjudications for a violation of this subsection, section 33b(1) of former 1933 (Ex Sess) PA 8, or a local ordinance substantially corresponding to this subsection or section 33b(1) of former 1933 (Ex Sess) PA 8, by imprisonment for not more than 60 days* but only if the minor has been found by the court to have violated an order of probation, failed to successfully complete any treatment, screening, or community service ordered by the court, or failed to pay any fine for that conviction or juvenile adjudication, a fine of not more than \$500.00, or both, and may be ordered to participate in substance abuse prevention services or substance abuse treatment and rehabilitation services as defined in section 6107 of the public health code, 1978 PA 368, MCL 333.6107, and designated by the administrator of substance abuse services, to perform community service, and to undergo substance abuse screening and assessment at his or her own expense as described in subsection (4).

“(2) A person who furnishes fraudulent identification to a minor, or notwithstanding subsection (1) a minor who uses fraudulent identification to purchase alcoholic liquor, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$100.00, or both.”

B. Elements

If the defendant is charged with purchasing, consuming, or possessing alcoholic liquor, the elements are:

- 1) Defendant was less than 21 years of age.
- 2) Defendant purchased or attempted to purchase, consumed or attempted to consume, or possessed or attempted to possess alcoholic liquor.
- 3) Defendant did not possess the alcoholic liquor for his or her personal consumption during regular working hours in the course of his or her employment by a person licensed under the Liquor Control Code, an agent of the Liquor Control Commission, or the commission itself.*
- 4) Defendant did not consume the alcoholic liquor in connection with a religious service.

*MCL
436.1703(8).
There are also
exceptions
contained in
subsections
(10) and (12) of
the statute.

If the defendant is charged with having any bodily alcohol content, the elements are:

- 1) Defendant was less than 21 years of age.
- 2) Defendant had either of the following:
 - an alcohol content of 0.02 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or
 - any presence of alcohol within his or her body resulting from the consumption of alcoholic liquor, other than consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony.

C. Licensing Sanctions

No points. The conviction is reported to the Secretary of State.

For violations of MCL 436.1703(1), if the person has one prior conviction for a violation of MCL 257.624a, MCL 257.624b, MCL 436.1703, or former MCL 436.33b(1), the Secretary of State shall suspend the person's driver's license for 90 days.* A restricted license may be issued after the first 30 days of suspension. MCL 436.1703(5) and MCL 257.319(7)(a). If the person has two or more prior convictions of these offenses, a one-year suspension is mandatory. A restricted license may be issued after the first 60 days of suspension. MCL 257.319(7)(b). A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a. "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

For a violation of MCL 436.1703(2), or a substantially corresponding local ordinance, the Secretary of State must suspend the person's driver's license for 90 days. MCL 257.319(3)(d).

D. Issues*

A peace officer may administer a "preliminary chemical breath analysis" or "PBT" to a minor suspected of violating MCL 436.1703, and the minor's refusal to submit to a PBT constitutes a state civil infraction. MCL 436.1703(6) states as follows:

"(6) A peace officer who has reasonable cause to believe a minor has consumed alcoholic liquor or has any bodily alcohol content may require the person to submit to a preliminary chemical breath analysis. A peace officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

*See Section 2.3 for special notice requirements when a minor is charged with a violation of this statute.

acceptable blood alcohol test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor or had any bodily alcohol content. A minor who refuses to submit to a preliminary chemical breath test analysis as required in this subsection is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than \$100.00.”

“Any bodily alcohol content” means either of the following:

“(a) An alcohol content of 0.02 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

“(b) Any presence of alcohol within a person’s body resulting from the consumption of alcoholic liquor, other than consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony.” MCL 436.1703(15)(a)–(b).

A juvenile or criminal defendant may assert as an affirmative defense that he or she legally consumed the alcohol in his or her body. MCL 436.1703(14) states as follows:

“(14) In a criminal prosecution for the violation of subsection (1) concerning a minor having any bodily alcohol content, it is an affirmative defense that the minor consumed the alcoholic liquor in a venue or location where that consumption is legal.”

For the requirements for ordering substance abuse screening and assessment, see MCL 436.1703(4).